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No. 99-1663

In the Supreme Court of the United States

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL., PETITIONERS,

v.

DISTRICT OF COLUMBIA, ET AL., RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND AMERICAN FARM BUREAU FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When analyzing a governmental regulation of property for Takings Clause purposes, how should courts determine the relevant unit of property in a case where a landowner owns several geographically contiguous parcels, only some of which are burdened by the regulation?

2. Does a governmental regulation of property that requires a landowner to leave eight contiguous lots in a completely undeveloped state as a grass lawn deny "all economically beneficial or productive use of land" within the meaning of *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)?

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INTEREST OF THE AMICI CURIAE [1]

The National Association of Home Builders (NAHB) represents over 190,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, condominiums, and apartments, but also commercial and industrial builders, remodelers, and land developers. It is the voice of the American shelter industry.

The NAHB, whose members are highly dependent on land use decisions made by government bodies, has appeared before this Court as amicus curiae or a party in many prior regulatory takings cases. Cases in which the NAHB has participated include *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999).

The American Farm Bureau Federation ("AFBF") was established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.9 million member families. AFBF's farmer and rancher members own or lease significant amounts of land, on which they depend for their livelihoods and upon which all Americans rely for food and other

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[1] This brief was not written in whole or in part by counsel for a party and no one other than NAHB and AFBF made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the Clerk.

basic necessities. Because that land is subject to increasingly onerous government regulation, AFBF and its members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause when regulation goes too far. Accordingly, AFBF has participated as an amicus in this Court in support of property rights in *Lucas*, *Dolan*, *Suitum*, and *Del Monte Dunes*, among other cases.

This case presents an issue of great importance to NAHB's and AFBF's members. How the relevant parcel is defined for purposes of takings analysis will often determine whether or not an NAHB or AFBF member whose investment-backed expectations in property have been interfered with by government regulation may obtain just compensation. Absent a clear rule on this issue, NAHB and AFBF members in different jurisdictions face inconsistent treatment under what is supposed to be a uniform national Takings Clause. And absent an approach that requires compensation in the circumstances of this case, home builders and farmers throughout the Nation run a substantial risk that government will use the indirect tool of regulation to obtain land for public amenities, rather than follow the constitutionality prescribed method of paying for those amenities. The Takings Clause is intended precisely to prevent what occurred in this case and what home builders and farmers endure over and over again: a government body forcing one landowner to bear all the cost of providing a public good, when "in all fairness and justice," that cost "should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

The NAHB and AFBF believe that they can illuminate the need for immediate review of the issues presented in the petition and the harmful consequences of leaving the so-called "denominator problem" unaddressed. If requiring eight out of a developer's nine lots to lie economically fallow in perpetuity as a "historic landmark" is not a taking, then virtually no home builder or farmer is safe from huge, uncompensated regulatory burdens in the name of the public good. That is not what the Framers of the Bill of Rights contemplated.

STATEMENT OF THE CASE

The critical facts in this case are few but telling. The District of Columbia granted petitioner District Intown Properties Limited Partnership permission to subdivide its eight-acre Cathedral Mansions property into nine contiguous lots.[2/] One of those lots contains a 1920s rental building. The other eight are grass lawn. After subdivision, the District taxed the eight lawn lots "at a higher rate, * * * reflecting [its] assessment that these lots are vacant developable land." Pet. App. 12a. The District's Department of Consumer and Regulatory Affairs (DCRA) subsequently granted zoning approval for petitioner to build one single-family townhouse on each of the eight lots maintained as lawn. Petitioner still had to obtain building permits for its townhouse project, however, and that is where things went awry. Pet. App. 1a, 3a, 29a-30a.

Residents in the Woodley Park neighborhood petitioned to have the Cathedral Mansions building and contiguous lots designated as a historic landmark. Petitioner did not object to the designation of the building, but vigorously protested the designation of the eight lawn lots. Despite the oddity of the notion that eight acres of lawn in a residential neighborhood—lawn with no historical associations except its proximity to a 1920s apartment building—could properly be termed a *historic landmark* (as opposed to, say, a desirable site for open space, see Pet. App. 26a), the District's Historic Preservation Review Board granted the neighbors' petition. Based on the historic landmark designation, the District denied petitioner a building permit and stated that "*any* construction destroying the lawn" would be incompatible with the historic landmark designation, effectively requiring that the lawn be maintained as such in perpetuity. Pet. App. 3a-4a, 29a-30a. As Judge Williams observed, "upper

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[2/] Petitioners include two general partners, but for the sake of simplicity we refer throughout only to the petitioner partnership.

Northwest Washington[ians thereby] secured some parkland on the cheap." Pet. App. 26a-27a.

Understandably, petitioner believed that since eight of its nine lots had been involuntarily converted into green space of no conceivable economic value, it had suffered a *Lucas* total wipe-out as to those eight lots and was entitled to just compensation. That claim—rejected by the district court and District of Columbia Circuit for reasons cogently summarized in the Petition—squarely raises a pure question of law that has perplexed lower courts, leaving one of the most important issues in takings law in total disarray: what is the relevant parcel (the "denominator") for purposes of determining if government regulation has worked a taking for which compensation is due? That question is in urgent need of this Court's attention.

As Judge Williams' thorough and incisive concurrence points out, the view of Chief Judge Edwards and Judge Rogers that the relevant parcel in this case was all nine lots taken together makes no sense as a matter of constitutional interpretation or of economics and has the effect of "obliterating takings law." Pet. App. 27a. It "elevates formal concepts over economic reality" and "strip[s] the Takings Clause of its potential" to fulfil the Framers purposes. Pet. App. 17a.

SUMMARY OF ARGUMENT

The "denominator problem" has percolated long enough in the state courts and lower federal courts and has wreaked enough havoc. It is time for this Court to bring coherence to a currently splintered doctrine that invites government to "game" the Takings Clause to achieve public goals at no cost—precisely the result the Framers of the Bill of Rights sought to avoid. This case presents clean facts and no extraneous issues and is the perfect vehicle for this Court to begin to address a question of critical practical importance to the *amici* and their members, and every other American landowner concerned about excessive, uncompensated land-use regulation.

Amici agree with petitioner that the correct analysis of the parcel for purposes of applying the Takings Clause is to look solely to the portion of the property that has been subjected to regulation. This Court should hear this case to establish that clear, easily applied, and constitutionally correct principle.

Even if those courts like the Federal Circuit that have applied a multi-factor test to determine the appropriate parcel are correct, the court of appeals here certainly erred in its understanding of the multi-factor test and in its choice and weighting of factors. If a multi-factor test is to be used to determine the denominator of the takings equation, this Court's guidance is urgently required to identify the relevant factors and their interrelationship.

Finally, the court of appeals' alternative holding that the eight lots condemned to remain lawn had economic use that precluded a successful takings claim itself warrants this Court's review. Lower courts need to be instructed that defendants' or courts' abilities to imagine hypothetical, speculative, or insignificant "economic" uses for land may not stand in the way of just compensation. "[T]he very barest thread of value, yielded by some thoroughly bucolic use," is not enough to defeat a total takings claim. Pet. App. 28a.

REASONS FOR GRANTING THE PETITION

I. THE DENOMINATOR PROBLEM REQUIRES THIS COURT'S IMMEDIATE ATTENTION.

The petition amply demonstrates that federal and state courts are in hopeless disarray over how to deal with the "denominator problem" identified but not resolved in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). The voluminous academic literature, a small part of which is surveyed in the Petition, is in as much disarray as the judicial decisions and provides no clear direction. The time is now ripe for the Court to provide some guidance, because the conflicts are deep-seated and involve complex issues that lower courts and

commentators have been unable to resolve with any consistency. The denominator problem will remain unresolved, and the conflicts will only deepen, unless this Court intervenes.

In recent years, the Court has greatly clarified the law of takings by addressing and resolving many outstanding questions about the meaning of the Fifth Amendment and the litigation of takings claims. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999); *Eastern Enters.* v. *Apfel*, 524 U.S. 498 (1998); *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas*, *supra*. A critical piece missing from the puzzle is a solution to the denominator problem—how to identify the relevant parcel for takings purposes. The importance of defining the property in question at the threshold of a takings inquiry makes that gap a huge one that seriously mars the coherence of modern takings jurisprudence.

Permitting the issues presented in the Petition to percolate longer in the lower courts will not illuminate or sharpen the denominator question any further. At this point, state and lower federal court decisions and the academic literature have identified and minutely discussed every plausible solution to the denominator problem (along with many solutions that are thoroughly implausible). Which if any of these fully articulated theories comports with the Takings Clause is a decision that only this Court can effectively make.

Delaying resolution of the denominator question any longer would cause great harm to home builders, farmers and ranchers, and other landowners. As the Petition amply demonstrates, on this issue of federal constitutional law involving important individual rights, courts in different jurisdictions—and even within the same jurisdiction—reach different conclusions as to whether compensation is due. The Fifth Amendment's requirement that private property not be taken for public use without the payment of just compensation should not mean different things depending

on where in the United States an owner's property is located. Large-scale developers operating in more than one jurisdiction, including many of the NAHB's members, should not have to deal with wildly different levels of constitutional protection for their various properties. Farmers in one jurisdiction should not have a different level of protection from neighbors in another.

In *Lucas* this Court noted that it is "unclear" what the proper takings equation denominator would be where "a regulation requires a developer to leave 90% of a rural tract in its natural state." 505 U.S. at 1016 n.7. This case provides the perfect opportunity to dispel that uncertainty. The District of Columbia has required petitioners to leave almost 90 percent of their original property as a lawn—the entirety of eight of nine subdivided lots. The only deviance from the *Lucas* Court's hypothetical—the tract's urban rather than rural location—is wholly immaterial for takings purposes. As set forth below and discussed in Judge Williams' opinion, we believe that it makes no legal or practical sense for the District to remove petitioner's right to build homes on its lots without paying compensation. But whatever the outcome, the importance of settling the widespread confusion over the proper denominator is beyond dispute.

II. THE DECISION BELOW CONFLICTS WITH THE MANDATE OF THE TAKINGS CLAUSE AND LEADS TO ABSURD CONSEQUENCES.

This Court held in *Lucas* that South Carolina's Beachfront Management Act, which precluded Mr. Lucas from building single-family homes on two beachfront lots that he had purchased prior to its enactment, effected a taking by depriving his property of all economic value. But what if the government had restricted development on only *one* of Lucas's two beachfront lots? Based on the court of appeals' decision in this case, Mr. Lucas would not have been entitled to *any* compensation. That cannot be right. Destroying all the value of every single contiguous parcel of land owned by a property owner cannot be the *only* way a taking occurs.

A. The Practical Ramifications Of The Court Of Appeals' Approach To The Denominator Problem Show That It Is In Error.

If the District of Columbia had formally condemned petitioner's eight lots, it would have been obliged to compensate petitioner. Yet, according to the court of appeals, petitioner gets *no* compensation even though its eight lots are of no more value to petitioner now than if they had been condemned outright. Based on the impact to the property owner, condemnation is condemnation whether it is traditional or inverse. To all intents and purposes, the District has condemned petitioner's eight lots for use as parkland or greenspace. See, *e.g.*, J.A. 320 (Historic Preservation Review Board states that the lawn "contributes significantly to the unique open space character of Connecticut Avenue"). The District should not be able to circumvent its obligation to pay just compensation by relying on historic preservation statutes to take the same land for the same park.

The decision below leads to absurd results. Suppose that Smith owns eight acres of land subdivided into one acre lots, adjacent to Jones' 10 acres, similarly subdivided. Suppose that a state agency designates 16 acres (eight lots each from Smith and Jones) as a protected area to be left in its natural state. Smith and Jones each have had eight acres of land rendered worthless and left without economic use. But if the court of appeals is right, Smith will get just compensation for the value of his eight acres, while Jones will get nothing for the value of her eight acres next door. If that is the law, one need not travel to Denmark to find that "something is rotten." W. Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act I sc. 4.

B. The Court Of Appeals' Decision Cannot Be Reconciled With The Purposes Of The Takings Clause.

The Takings Clause protects private property against the cavalier treatment that petitioner received at the hands of the District of Columbia in this case. The Takings Clause does not

say: "Nor shall private property be taken for public use, without just compensation, *unless some economically useful property is left with the property owner.*" And such a qualifier cannot reasonably be read into the Clause consistent with the Framers' intentions. "[P]rotection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights*, 76 Cal. L. Rev. 267, 270 (1988). The Framers viewed the protection of property rights, and particularly rights in land, as "the first object of government." FEDERALIST NO. 10, at 78 (Madison) (C. Rossiter ed. 1961). That conviction rested on the Framers' understanding that private property constitutes "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). Indeed, government "is instituted no less for protection of the property than of the persons of individuals." FEDERALIST NO. 54, *supra*, at 339 (Madison). Hence, the Takings Clause, a bulwark against arbitrary rule that fosters respect for individuals and their property rights, is fundamental to our constitutional order. As this Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392.

Based on these principles, the District has taken petitioners' property by preventing them from putting their eight lots to profitable use. Ownership of property is a "bundle of rights" (*Dolan*, 512 U.S. at 393) that includes "the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-378 (1945); see also J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 55, at 43 (1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights," including "the right to use a thing in this way or that"). The court of appeals' decision treats the abrogation of one stick in that bundle of rights—the use by petitioner of eight lots—as noncompensable. But abrogation of the use stick destroys, in economic terms, the entire bundle.

What is the value of possession without use? And how can one profitably dispose of property that cannot be used? Thus, by rendering petitioners' property economically useless, the District has taken it, triggering the just compensation obligation.

If the District had physically invaded petitioners' eight lots, the taking would be unquestionable and categorical. *Lucas*, 505 U.S. at 1015; see *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). By depriving petitioners' eight lots of all reasonable economic use, the District has effectively imposed a negative easement on petitioners' property that is "the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. See also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1187 (1967) (rejecting "any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint"). As Justice Brennan explained, it makes little difference to the property owner "whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan J., dissenting); see also *Keystone*, 480 U.S. at 516 (regulations can cause "'as complete a loss as if the government had entered upon the surface of the land and taken exclusive possession of it'") (Rehnquist, J., dissenting). If a one-half inch cable across one's roof is a compensable taking (see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982)), and the same is true of a narrow public easement across one's beachfront property (*Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987)), denying compensation to a landowner who is prevented from making any economic use of eight-ninths of its property defies both common sense and legal reason.

The Takings Clause, after all, subjects governmental regulation "to the dictates of 'justice and fairness.'" *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). However desirable an

additional greenspace might be for neighborhood residents, even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922). And the desirability of additional open space near the National Zoo cannot override that constitutional obligation, because a similar "justification can be formulated in practically every case." *Lucas*, 505 U.S. at 1025 n.12.

In *Lucas*, this Court rejected the notion that general benefits resulting from the State's beachfront development ban, accruing to Mr. Lucas as well as to the general public, prevented the ban from being a taking. 505 U.S. at 1017. And the Court noted in *Dolan* that even if reducing flood and traffic hazards were "laudable" goals and benefitted Mrs. Dolan, it was "improper" to saddle her with more than her fair share of the costs of attaining them. 512 U.S. at 396. By the same token, forcing petitioners to lose the value of their eight lots to maintain pleasing sight lines in the Woodley Park neighborhood would "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

The unfairness of the decision below is compounded by the strategic gamesmanship that it would encourage. A rule that allows government to regulate eight-ninths of an owner's land to the point where it has absolutely no economic use, yet avoid paying compensation, is bound to encourage regulatory overreaching. A city could obtain parks for free under that approach simply by leaving burdened owners with small parts of their land. Governments could reward favored voters by providing amenities without raising taxes, simply by targeting land use regulations to portions of the properties of less favored landowners. "[A]djusting the benefits and burdens of economic life" is one thing (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), but seizing from one and bestowing on another is something else again. See *United States* v. *Security*

Indus. Bank, 459 U.S. 70, 78 (1982) (Takings Clause protects against "a general economic regulation which in effect transfers the property interest from a private [party] to a private [party]"). In this case, the District's transformation of *lawn* into an historic monument exemplifies the risk of reckless regulation inherent in the court of appeals' approach.

The Takings Clause not only guards against such unfair and discriminatory conduct, but in doing so fosters efficient government. As Judge Williams explained below, the Takings Clause properly applied serves "as a disincentive to wasteful government activities" by providing "a check on government's likely tendency to waste resources by treating private property as a free good." Pet. App. 18a. If the District is told that it must pay for the land it covets for open space, it will have to fully account for its own resources and those of all its citizens and property owners. Such accountable decisionmaking, in addition to its more general benefits, would comport with the Constitution.

III. ON ANY DENOMINATOR THEORY, THE DISTRICT TOOK PETITIONERS' PROPERTY.

Amici NAHB and AFBF agree with petitioner, for the reasons set forth in the Petition, that the correct way to determine whether regulations affecting less than all of a parcel effect a categorical taking is by focusing on the regulated portion of the property. Thus, the long-developed Lot 106 should be factored out of the inquiry as to whether the District took petitioners' property by preventing the later development of Lots 107-114. We note, however, that even under the multi-factor test derived from the Federal Circuit cases, which the court of appeals' majority applied, the decision below is erroneous.

The Federal Circuit has played a leading role in defining and analyzing the denominator problem in regulatory takings cases. In *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994), the plaintiff acquired 250 acres and later developed all but 51 of those acres for residential units. When it later sought to develop the remaining 51 acres, New Jersey authorized it to

develop 12.5 acres so long as it dedicated the remaining 38.5 acres to the state. A federal agency then refused to authorize development of the 12.5 acres. The Federal Circuit held that the relevant parcel for takings purposes was the 12.5 acres, not the 51 acres or the 250 acres, and it found a taking because the property owner was deprived of all viable economic use of those 12.5 acres. *Id.* at 1181. See also *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1380-1381 (Fed. Cir. 2000) (proper denominator was the 50.7 acres for which permit was denied, not the entire 311.7 acres originally purchased by plaintiffs); *Florida Rock Indus.* v. *United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (proper denominator was 98-acre tract that government had denied permission to develop, not the entire 1560-acre parcel purchased by plaintiff).

Although the Federal Circuit has described its multi-factor test for the proper denominator as a "flexible approach, designed to account for factual nuances" (*Loveladies Harbor*, 28 F.3d at 1181), the court has "objectif[ied] the factual inquiry" in its recent cases raising the denominator problem. See Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 Cornell L. Rev. 586, 616 (2000). Here, as described by Judge Williams, the court of appeals disregarded objective and central factors supporting petitioners' position and instead relied on manipulable factors of little or no significance. It is critical that the Court not only set to right the court of appeals' misplaced resolution of the denominator problem, but also provide some guidance on how any multi-factor test is to work.

One important factor should be whether state property law authorizes the division of the property and the use that is being denied. See *Lucas*, 505 U.S. at 1016 n.7. Another should be the independent economic viability of each of the separate parcels. See *Machipongo Land & Coal Co.* v. *Department of Envtl. Resources*, 719 A.2d 19, 28 (Pa. Commw. Ct. 1998); Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994). Yet another should be whether the authorities treat the regulated and unregulated parcels

differently for zoning or taxation purposes. See *American Sav. & Loan Ass'n* v. *Marin County*, 653 F.2d 364 (9th Cir. 1981). In this case, any test that does not give controlling weight to the fact that petitioners' property was legally subdivided (Pet. App. 20a), that the subdivided lots have been taxed as developable property at a higher rate than developed property (*ibid.*), that the undeveloped lots add no significant value to the developed lot (Pet. App. 9a), and that the undeveloped lots retain no reasonable economic use (Pet. App. 22), is seriously mistaken and at odds with the entire thrust of the Takings Clause.

This Court suggested in *Lucas* that the property owner's reasonable expectations may be an important factor in the definition of the relevant parcel. 505 U.S. at 1016 n.7. That makes sense, so long as the general *possibility* of regulation in this highly regulated society does not equate to an expectation that the value of every development may be regulated out of existence. As Judge Williams pointed out, in this case it is simply "farfetched to conclude that District Intown, merely because of its proximity to the zoo, should reasonably have anticipated an absolute ban on construction." Pet. App. 21a-22a. Nor did petitioner have any reason to expect that general and longstanding preservation statutes would block the routine building of townhouses on empty lots next to its existing apartment building. To the contrary, petitioner had every reason to expect that it could rely on the District's approval of its application to subdivide its property into nine lots and DCRA's subsequent zoning approval. Pet. 2. See 2 J. AUSTIN, LECTURES ON JURISPRUDENCE § 1128, at 256-257 (Robert Campbell ed. 1875) ("whenever expectations have been raised in accordance with the declared purpose and concession of the state, to disappoint those expectations by recall of the concession * * * [is] pernicious").

Instead of taking an objective approach to the denominator problem, the decision below, as Judge Williams recognized, "elevates formal concepts over economic reality and tends to strip the Clause of its potential for fulfilling the framers' likely purposes." Pet. App. 17a. In particular, the factors relied on by the

court of appeals, including contiguity, simultaneity of acquisition, and historical use, subordinate the actual economic relationship between the tracts to misty historical and tangential considerations.

By making contiguity a controlling factor, the court of appeals effectively declared a "presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis." Pet. App. 19a. But no such presumption governs eminent domain cases: if a person owns an office building next to a house and the government condemns the office building, the government has to pay for the value of the office building, contiguous to the house or not. Perhaps regulatory takings cases require a more complex analysis, but that would not justify the court of appeals' loaded presumption. Moreover, placing so much emphasis on contiguity discriminates against large holdings: the larger the parcel, the more likely the survival of some economically viable use after regulation, giving government a free shot at stopping any development on such holdings.

Indeed, under the contiguity presumption, if A and B each own an empty lot near a zoo, with A residing in his house on an adjoining lot and B in her house across town, precluding development of the two empty lots will "take" B's property but not A's. This illustration shows that contiguity of parcels is part of the denominator *problem*; it rarely will offer a *solution*.

Simultaneity of acquisition and unity of ownership are also factors of limited value. If one person buys a sugar mill and a cattle ranch at the same time, that says nothing about whether the government's destruction of all the sugar mill's value decades later is or is not a taking. Moreover, such factors necessarily generate perverse incentives. For example, if unitary acquisition and ownership are enough to defeat a takings claim, then land owners would do well to contract for "shills" to transform what really is one transaction into several and to create multiple "paper" owners. See Rose, Mahon *Reconstructed: Why the Takings Issue*

is Still a Muddle, 57 S. Cal. L. Rev. 561, 568 (1984) (warning that misapplication of Takings Clause "may cause owners to make elaborate and socially useless splits of their property rights"). Such game-playing by property owners would be just as costly and inefficient as the maneuvering by the District of Columbia in this case. The Framers did not intend, when they gave constitutional protection to the ownership of property, to create a game in which the rules were subject to manipulation by either the government or property owners.

In sum, if the lower courts should determine the denominator by focusing on the land subject to the regulation at issue, as we strongly believe, this Court should say so. If that determination instead should rest on a broader multi-factor test, this Court urgently needs to convey guidance on what the relevant factors are and how to apply them. In either event, reversing the decision below will permit the Takings Clause to take its place "as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

IV. THIS COURT SHOULD MAKE CLEAR THAT DE MINIMIS OR SPECULATIVE USES ARE NOT ENOUGH TO DEFEAT A TAKINGS CLAIM.

The District found that "any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark." Pet. App. 13a; J.A. 368. Yet Judge Edwards' opinion concluded that even looking at the eight lawn lots separately, there was no taking because those lots were not "rendered 'valueless' by the regulation at issue." Pet. App. 13a. According to the majority, something "marginally less than total destruction" is never a taking. *Ibid.*

That Judge Edwards cited *Lucas* for this proposition is remarkable. In *Lucas*, Justice Blackmun *in dissent* described the conclusion "that the property had lost all economic value" as "almost certainly erroneous" because "[p]etitioner still can enjoy other attributes of ownership, such as the right to exclude others"

or "to alienate the land." 505 U.S. at 1043-1044. According to Justice Blackmun, Lucas' ability to continue to "picnic, swim, camp in a tent, or live on the property in a moveable trailer" was enough to counter his takings claim: "land has economic value [sufficient to defeat a takings claim] where the only residual economic uses are recreation or camping." But the Court did not adopt that view.

As Judge Williams complained, under the standard applied by the majority in this case (and by Justice Blackmun in dissent in *Lucas*), "no regulation can ever effect a total taking." Pet. App. 28a. There will always be some conceivable use of property. Here, the owners could picnic on the lawns, or play croquet, or perhaps create spectacular flower gardens to enjoy. Maybe they could even charge others to use the property in these ways. But none of those are reasonable economic uses. At best, they create de minimis value that bears no comparison to the value of the land for building. This Court should grant plenary review in this case to make clear that "the very barest thread of value, yielded by some thoroughly bucolic use," does not "defeat a total takings claim." Pet. App. 28a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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